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No. 87-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC.,
Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.,
Respondent-Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT FIRST CITY BANCORPORATION OF TEXAS, INC., IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. Whether the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841, *et. seq.* (1982), absolutely prohibits the Board of Governors of the Federal Reserve System ("Board") from approving the acquisition of a national bank by an out-of-state bank holding company.

II. Whether the Board is precluded from approving the acquisition of a national bank in South Dakota by an out-of-state bank holding company because a South Dakota statute places certain limitations on the operation of banks so acquired.

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BRIEF OF RESPONDENT FIRST CITY BANCORPORATION OF TEXAS, INC.[1] IN OPPOSITION TO PETITION

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[1] Pursuant to Rule 28.1, First City notes that the following are subsidiaries not wholly owned by First City: First City Bank—Farmers Branch; Citizens Bank—Central Arlington, N.A.; First City National Bank of San Angelo; and First City National Bank of Midland.

The Petition fails to state a sufficient basis for review by this Court and the decision below, which thoroughly discussed and rejected the Petitioner's claims, was correct. Respondent (intervenor below) First City Bancorporation of Texas, Inc. ("First City") therefore submits that this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case arises from the organization and operation of a new national bank, First City Bank—Sioux Falls, N.A. ("Bank"), for the primary purpose of offering consumer credit card services.[2] The regulatory activity preliminary to the opening of the Bank began in May 1984 when First City, a bank holding company with its principal place of business in Texas, applied to the Comptroller of the Currency ("Comptroller") for a charter authorizing the establishment of the Bank. Simultaneously, First City applied to the South Dakota Banking Commission ("Commission") for approval under South Dakota law to acquire the Bank's voting shares once the Bank was established. The Commission granted First City's request in July 1984, and in February 1985 the Comptroller granted preliminary approval of the requested national bank charter.

The Petitioner, the Independent Community Bankers Association of South Dakota, opposed First City's application before the Commission. The Commission

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[2] The Bank's credit card services are offered primarily to customers in a regional market consisting of Texas, Louisiana, Arkansas, Oklahoma, Colorado and New Mexico. The Bank also provides other banking services.

nonetheless found that the proposed acquisition by First City was in full compliance with South Dakota law regulating interstate acquisitions, S.D. Codified Laws Ann. §§ 51-16-40 through 42 (Supp. 1986), that the South Dakota law did not conflict with federal law, and that the operation of the new Bank would benefit the citizens of South Dakota. The Petitioner chose not to appeal the Commission's decision and did not participate at all in the proceedings before the Comptroller.[3]

Following the Comptroller's preliminary approval, First City applied to the Board, under section 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842 (1982), for prior approval of First City's acquisition of the Bank's voting shares. Before the Board, the Petitioner asserted that the Board lacked authority to approve *any* acquisition of a national bank by an out-of-state bank holding company, and that limitations the South Dakota statute imposed on the Bank's operations restricted those operations to a degree that conflicted with national banking laws. In July 1985 the Board approved First City's application, rejecting each of the Petitioner's claims. First, the Board determined that the plain language of section 3(d) of the Bank Holding Company Act, known as the "Douglas Amendment," 12 U.S.C. § 1842(d) (1982), authorizes the Board to approve acquisitions of national (as well as state) banks by out-of-state bank holding companies when the state in which the bank to be acquired is located enacts a statute allowing acquisitions of state banks by out-of-state bank

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[3] Therefore, to the extent the Petition can be read to request review of the Comptroller's chartering of the Bank, the Petition must be denied.

holding companies. Joint Appendix ("J.A.") at 37.[4] The Board further determined that the South Dakota statute under which the Commission had acted did not, as applied to the Bank, conflict with any federal law. *Id.* at 39-40. Following the Board's decision, a charter for the Bank was granted by the Comptroller and First City acquired the Bank's voting shares. In August 1985 the Bank began operations.

REASONS FOR DENYING THE WRIT

This case does not present an important question of Federal law.

A. The Plain Language of the Statute Allows the Board to Approve the Acquisition of National As Well As State Banks By Out-of-State Bank Holding Companies.

As explained in the decision below, the Douglas Amendment, 12 U.S.C. § 1842(d), contains two operative provisions regulating the ability of the Board to approve the acquisition of a bank by an out-of-state bank holding company. The first provision prohibits Board approval of an application by a bank holding company to acquire any voting shares of, or interest in, or substantially all the assets of "any additional bank"[5] in another state. The second provision lifts that prohibition if

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[4] The Petitioner has inaccurately labeled the Appendix to the Petition as a "Joint Appendix." For purposes of clarity, First City will retain that designation and thus refer to the Petitioner's Appendix as the "Joint Appendix" or "J.A."

[5] As the Petitioner correctly notes, Petition at 9, the Bank Holding Company Act defines "bank" to include both state and national banks. 12 U.S.C. § 1841(c) (1982).

> the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication.

12 U.S.C. § 1842(d) (1982). Thus, the Board is authorized to approve the acquisition of "any additional bank" by an out-of-state bank holding company if the state in which the bank is located has enacted a qualifying statute. A qualifying statute is one that allows the acquisition of a state bank, *i.e.*, a bank chartered by the state.

The Petitioner's claim, rejected by both the Board and the Court of Appeals, is that a state law can only lift the ban on Board approval of acquisitions of state banks by out-of-state bank holding companies and that national banks are excluded from the permissive portion of the Douglas Amendment. Neither the language of the Bank Holding Company Act nor the structure of the national banking laws supports such an interpretation.

The federal banking laws have traditionally given the Comptroller of the Currency primary responsibility for supervising national banks and given state authorities primary responsibility for supervising state banks. Consistent with this approach, Congress deliberately chose to tie the lifting of the Douglas Amendment's blanket ban on interstate acquisitions of banks in any state to that state's enactment of legislation relating to its own state-chartered banks.[6] Adoption

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[6] Prior to the enactment of section 3(d) of the Bank Holding

of the Petitioner's position would require the Court to read out of the first portion of the Douglas Amendment the reference to "any additional Bank" and to replace that language with the term "State bank" found in the second operative provision of section 1842(d). The Court of Appeals correctly held that the Petitioner's "tortured reading" of the Douglas Amendment, which would upset the carefully crafted, parallel treatment of state and national banks, "is incompatible with the actual language of the statute." J.A. at 12.

Adoption of the Petitioner's theory would also destroy the legal basis for numerous acquisitions of national banks by out-of-state bank holding companies that the Board has approved to date,[7] including acquisitions under failing bank and regional reciprocal

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Company Act, the same concept had been applied in the bank branching context, as evidenced by the McFadden Act, 12 U.S.C. § 36 (1982). In that Act,

> Congress intended "to leave the question of the desireability of branch banking up to the state" . . . and to permit branch banking by national banks " 'in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking.' " [First National Bank v. Walker Bank & Trust Co., 385 U.S. 252,] 259 (quoting Sen. Glass, 76 Cong. Rec. 2511 (1933)).

Northeast Bancorp v. Board of Governors, 472 U.S. 159, 171-72 (1985). The legislative history of section 3(d) of the Bank Holding Company Act, as well as the language of the statute, shows that the intent of the Douglas Amendment was to apply a parallel approach to bank holding company acquisitions of banks across state lines. *Id.;* J.A. at 14-16.

[7] The Petitioner concedes that for fifteen years, "the Board has *routinely* approved" the acquisition of national banks pursuant to section 1842(d). Petition at 7 (emphasis added).

statutes. Indeed, approvals of applications for the acquisition of national banks were among those before this Court in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159, 165 (1985) (*"Northeast Bancorp"*), although the precise question now raised was not addressed there. The Board's consistent interpretation of the statute as permitting such acquisitions is entitled to considerable weight, *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System,* 468 U.S. 137, 142 (1984), and should not be overturned absent "compelling indications it is wrong." *Red Lion Broadcasting Co. v. Federal Communication Comm'n,* 395 U.S. 367 (1969) (footnote omitted). The Petition presents no indication, much less a "compelling" one, that the Board's longstanding interpretation is wrong.

B. This Case Presents No Conflict Between State and Federal Law.

Alleging conflicts between the South Dakota law and unspecified provisions of the "national banking laws," the Petitioner urges that the Court should review this case in order to address "serious public policy questions" and to provide "interpretive construction and elucidation" of the national banking laws. Petition at 14. Similarly, the Petitioner pleads with this Court to address the "debatable questions" it presents and to resolve unstated "uncertainties" regarding the possible future impact of South Dakota's exercise of the authority given to it by the Douglas Amendment. Petition at 16-17. This rhetoric cannot hide the fact that the Petitioner's request is one for an advisory opinion on matters not presented by this case.[8]

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[8] The Petitioner's standing to raise this issue is highly ques-

The Petitioner claims that the Court must invalidate both the Board's order and the South Dakota statute[9] on the ground that, under the Douglas Amendment, the states cannot impose any condition on the operation of a national bank acquired by an out-of-state bank holding company. Yet this Court recently held that the Douglas Amendment does not preclude the imposition of conditions on the entry of out-of-state bank holding companies and that a state is to be allowed "flexibility in its approach." 472 U.S. at 171. South Dakota has exercised its flexible authority in a manner that the Board, the agency responsible for interpretation of the Bank Holding Company Act, has found does not violate the Act. J.A. at 39. Likewise, the Comptroller, who is responsible for granting charters and supervising national banks under the National Bank Act, has determined that the operation of the Bank under the terms of the Commission's order does not run afoul of that statute. *See* J.A. at 26-27.[10]

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tionable. The Petitioner is an association of independent South Dakota banks. The limited restrictions on bank operations contained in the South Dakota legislation at issue do not apply to the Petitioner's member banks. Indeed, they were specifically designed to protect existing South Dakota banks—including the Petitioner's member banks. First City does not see how such provisions can even arguably harm the Petitioner or its member banks.

[9] As noted previously, the Petitioner did not appeal the Commission's order approving First City's acquisition of the Bank.

[10] Matters regarding the scope, issuance, and operation of national bank charters are properly within the jurisdiction of the Comptroller of the Currency; his views are to be given "great weight." Investment Company Institute v. Camp, 401 U.S. 617, 626 (1971).

On appeal, the Petitioner sought to have the court below find a conflict between the South Dakota statute and the McFadden Act, 12 U.S.C. § 36 (1982). That court correctly found that no such conflict exists.[11] As the Court of Appeals held, the South Dakota statute, which provides for limitations on branching by *any* bank, state or national, that is owned by an out-of-state bank holding company, is completely consistent with the concept of equality of treatment contemplated by the McFadden Act. *See* J.A. at 23-24.

Equally unavailing is the Petitioner's effort to secure Court review by reference to the "concern, on the part of both the Board and the Court of Appeals, about the trend toward the establishment of limited service banks controlled by out-of-state bank holding companies." Petition at 14. While expressing such concern, both the Board and the court below permitted First City's acquisition to proceed. The Board and the Comptroller retain the ability to monitor the future application of the South Dakota statute. Under these circumstances, the court below refused the Petitioner's invitation, now pressed upon this Court, to speculate "regarding future application of South Dakota's special purpose statute," Petition at 14, concluding instead that "[t]he South Dakota statute . . . as presently interpreted . . . does not conflict with the National Bank Act and other federal banking statutes." J.A. at 28. The Petitioner's vague assertions of future conflicts provide no basis for review of that conclusion.

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[11] This argument was never raised before the Board and was thus not an issue that the court below had to decide. *See* Washington Ass'n for Television & Children v. Federal Communications Comm'n, 712 F.2d 677 (D.C. Cir. 1983).

Finally, no basis for review is provided by the Petitioner's assertion that "the flag is raised" by the South Dakota statute and that therefore "banking laws need to be overhauled to conform with federal law." Petition at 14. "Overhauling" statutes is not the province of this Court or of the Board. If there is a need for changes in the national banking laws, Congress is the appropriate forum to "define the boundaries for making these changes." *Id.*

Because the Petition presents no argument requiring the Court's attention, this Court should deny the writ.

Respectfully submitted,

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